

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2008-196-E

IN RE:

Combined Application of South Carolina)
Electric & Gas Company for Approval)
of a Certificate of Environmental)
Compatibility and Public Convenience and)
Necessity and for a Base Load Review Order))
for the Construction and Operation of a)
Nuclear Facility in Jenkinsville, South)
Carolina.)
_____)

MOTION TO QUASH SUBPOENA

Pursuant to 26 S.C. Code Ann. Regs 103-829.A and 103-832. (2007) and other applicable law, the South Carolina Office of Regulatory Staff (“ORS”) respectfully submits this Motion to Quash Subpoena. In support of said Motion, ORS would show the following:

ORS is a statutory party in all matters before the Public Service Commission of South Carolina (“the Commission”) unless it chooses to opt out.

ORS is charged by law with the duty to represent the public interest of South Carolina pursuant to S.C. Code § 58-4-10 (B) (2007). S.C. Code § 58-4-10(B) (1) through (3) reads in part as follows:

...’public interest’ means a balancing of the following:

- (1) concerns of the using and consuming public with respect to public utility services, regardless of the class of customer;
- (2) economic development and job attraction and retention in South Carolina; and
- (3) preservation of the financial integrity of the State’s public utilities and continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.

South Carolina Electric and Gas (“SCE&G”) filed its Combined Application for Certificate of Environmental Compatibility, Public Convenience and Necessity and for a Base Load Review Order (“Application”) on May 30, 2008.

On September 2, 2008 the Commission’s Hearing Officer in this docket issued a Commission Hearing Officer Directive (“Directive”) setting forth the following deadlines:

Applicant’s Direct Testimony Due – September 16, 2008

All Other Parties’ Direct Testimony Due – October 17, 2008

Applicant’s Rebuttal Testimony Due – October 31, 2008

All Other Parties’ Surrebuttal Testimony Due – November 14, 2008

See attached Directive labeled Attachment 1.

The Directive stated that, “All testimony must be filed with the Commission and served on the parties via e-mail on or before the dates prescribed. If a party does not have an e-mail address, then such party must be served a copy of the testimony by First-Class U.S. Mail.” The Directive stated the parties are to comply with the deadline schedule.

On October 17, 2008, ORS prefiled and served on all the parties the direct testimony of eight witnesses consisting of over 100 pages and numerous exhibits.

The Directive noted, “[T]he hearing in this Docket currently scheduled to begin on Monday, October 27, 2008, is rescheduled to begin on Monday, December 1, 2008 at 9:30 a.m. and continue through Friday, December 5, 2008.”

The hearing began on December 1, 2008; however, it was not concluded by December 5, 2008 and was carried over into the following week and is still continuing as of the date of this Motion.

At the outset of the hearing on the morning of December 1, 2008, *Pro Se* Intervenor Pamela Greenlaw (“*Pro Se* Intervenor”) requested that certain state agencies be required to attend and participate in the hearing. *Pro Se* Intervenor’s request was denied by the Commission on the basis that *Pro Se* Intervenor could have issued a subpoena and conducted discovery and that the time period for doing so was over.

Early evening Friday, December 5, 2008 shortly before the hearing was adjourned for the day and after the hearing had been ongoing for five days, *Pro Se* Intervenor moved to request, for the first time, a subpoena for South Carolina ORS Executive Director, Dukes Scott, Esquire.

Executive Director C. Dukes Scott, Esquire is an attorney of record representing ORS in this matter having filed a Notice of Appearance in this docket.

Pro Se Intervenor attempted service of the subpoena on Monday, December 8, 2008.

26 S.C. Code Ann. Regs 103-832 (2007) states, “Subpoenas and Supoenas Duces Tecum shall be issued and served in a manner consistent with the South Carolina Rules of Civil Procedure.” South Carolina Rules of Civil Procedure Rule 45 sets forth the rules for issuance of a subpoena.

26 S.C. Code Ann. Regs 103-829.A states that a written motion to quash a subpoena will be made pursuant to Reg. 103-832.

ORS opposes the subpoena and hereby moves to have said subpoena quashed for the reasons set forth below:

1. The South Carolina Rules of Professional Conduct disallow the Executive Director from acting as a witness in this docket since the Executive Director is a legal representative of ORS acting in his capacity as an attorney. For this reason, the motion to quash should be granted.
2. It has been held that on motion to quash a subpoena, the trial court may consider: (1)

whether the subpoena was issued primarily for purposes of harassment; (2) whether there are other viable means to obtain the same evidence; and (3) the extent to which the information sought is relevant, nonprivileged, and crucial to the moving party's case. Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 66 (1st Cir. 2003). In ruling to quash the subpoena, the Bogosian court noted that party-to-the-action Bogosian served the subpoena the day before trial, did not explain why a deposition had not previously been sought and made no showing of the inability to obtain the evidence from other witnesses. Id. at 67. Here, *Pro Se* Intervenor requested the subpoena on the fifth day of the hearing – over six months after SCE&G filed its Application. *Pro Se* Intervenor did not seek to avail herself of discovery within the Commission guidelines at any time and cannot show the information is not available from the eight ORS witnesses set to testify in the hearing.¹

3. The United States Supreme Court has recognized the need for protecting agency heads from examination in United States v. Morgan, 313 U.S. 409, 421-22 (1941). In Morgan, the Court recognized the Secretary of Agriculture as being the guardian of public interest in regulating a business of public concern and with the reasoning that the integrity of the administrative process must be respected, held that it was not the function of the court to probe the mental process of the Secretary of Agriculture.² Id. at 415 and 422. This protection is deemed the Morgan immunity. Horne v. School Board of Miami-Dade County, 901 So.2d 238,

¹ To the extent *Pro Se* Intervenor seeks to determine why the Executive Director has in the course of his job duties made certain decisions as to the course of the agency, such matters are irrelevant to the issue of whether the Commission should grant South Carolina Electric & Gas Company's Baseload Application ("Application"). Further, the Executive Director has not worked directly on the Application and has no probative evidence to offer that could not be offered by ORS's eight witnesses. Regardless, the thought processes of the agency's Executive Director should not be interrogated.

² It is noteworthy that the ORS Executive Director during prior employment with the Public Service Commission of South Carolina successfully defended in Circuit Court a Motion to Quash Subpoenas filed by an Intervenor against the Commissioners in a South Carolina Electric & Gas case before Circuit Court Judge Cox. The Circuit Court case arose from Commission Docket Nos. 1979-196-E and 1979-197-G. The Executive Director successfully presented a holding set forth in United States v. Morgan, 313 U.S. 409, 421-22 (1941), stating that it is not appropriate to "probe the mental processes" of Commissioners. Judge Cox quashed the subpoenas.

240 (2005). Other courts have reasoned similarly stating, “[H]igh ranking government officials have greater duties and time constraints than other witnesses.”³ In re United States (Kessler), 985 F.2d 510, 512 (11th Cir.1993). If asked to testify in every case involving his or her agency, the government official’s time would be monopolized by preparing and testifying in such cases. See Id. Top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions. In re United States (Kessler), 985 F.2d 510, 512 (11th Cir.1993) (per curiam) (quoting Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C.Cir. 1985)). Facts weigh against allowing a subpoena of a high ranking official when testimony is available from alternate witnesses. Id.; see also In re FDIC, 58 F.3d 1055, 1062 (5th Cir. 1995) (“We think it will be the rarest of cases... in which exceptional circumstances can be shown....”). Allegations that a high government official acted improperly are insufficient to justify the subpoena of that official unless the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result. See In re FDIC, 58 F.3d at 1062. Accordingly, case law demonstrates that subpoenas are discouraged for agency heads and if a subpoena is permitted, *Pro Se* Intervenor must show exigent circumstances to establish that the Executive Director possesses information essential to her case which is not obtainable from another witness, that such information is relevant and thirdly, must show compelling evidence of improper behavior. Kessler, 985 F.2d at 512-13; see also In re FDIC, 58 F.3d at 1062. Without establishing this minimum foundation, exceptional circumstances cannot be shown sufficient to justify a subpoena. See id. ORS submits that the Executive Director has engaged in no improper behavior and has no probative evidence related to the Application in this docket that its eight witnesses cannot testify to.

³ As an example, the Executive Director is to appear before a member of the General Assembly on December 9, 2008 and is required to appear before the General Assembly on December 11, 2008.

4. *Pro Se* Intervenor's subpoena is not timely. Rule 45 (c)(3)(A)(i), SCRCP provides that the court shall quash the subpoena if it fails to allow reasonable time for compliance. A subpoena requested on the fifth day of a hearing and then issued three days later to the Executive Director of an agency providing eight witnesses on the matter does not provide reasonable time for compliance and begs the question of what can the Executive Director provide that ORS's witnesses cannot? Further, Commission Reg. 103-833 requires that discovery be served no less than 10 days prior to the date assigned for commencement of a hearing unless special circumstances or good cause is shown. Another intervenor in this docket, Ms. Ruth Thomas, availed herself of this opportunity by issuing discovery requests to ORS, and ORS promptly responded. *Pro Se* Intervenor's motion to request a subpoena, occurring during the fifth day of the hearing, is without any showing of special circumstances or good cause. *Pro Se* Intervenor had the opportunity to present discovery to any party of record and chose not to do so. Just as the Commission ruled in the request that certain state agencies be required to attend and participate in the hearing, the Commission should also quash *Pro Se* Intervenor's subpoena on the basis that the time period for issuing a subpoena and discovery is over pursuant to the Commission's guidelines and that time for compliance has expired.

5. The subpoena subjects the Executive Director to undue burden. Rule 45(c)(3)(A)(iv), SCRCP provides that the court shall quash a subpoena if it subjects a person to undue burden. ORS pre-filed testimony of eight witnesses in this case who are set to begin testifying on or shortly after December 9, 2008. *Pro Se* Intervenor provided no reasons in her motion as to why the Executive Director has special knowledge that the eight witnesses set to testify before the Commission on behalf of ORS does not possess. Given the lack of timeliness on *Pro Se* Intervenor's part, and the Executive Director's required duties, to require the Executive Director

to be at the beck and call of any party issuing a subpoena without properly following rules, creates an enormous amount of undue burden. Accordingly, this motion to quash should be granted.

6. The Commission's Hearing Officer Directive specifically stated that parties must prefile the testimony of any witnesses it intended to present at the hearing. *Pro Se* Intervenor did not prefile the testimony of the Executive Director or seek to obtain the testimony of the Executive Director to comply with the Commission's prefiled testimony deadlines. For this reason, the motion to quash should be granted.

7. *Pro Se* Intervenor, a party to this matter, served the subpoena herself and in doing so, did not properly serve the subpoena. Rule 45(b)(1), SCRCF states that a subpoena may be served by any person who is not a party. *Pro Se* Intervenor's subpoena was not served in a manner consistent with the South Carolina Rules of Civil Procedure. As such, the motion to quash should be granted.

8. Lastly, ORS represents the public interest and in carrying out its duty of representing the entire public interest for the State of South Carolina, it would be improper for another party in a proceeding before the Commission to use the ORS Executive Director in an attempt to support a specific position in a case.

WHEREFORE, ORS requests the following relief:

1. That the Commission grant ORS's Motion to Quash the Subpoena issued to the ORS Executive Director, C. Dukes Scott.
2. That the Commission order any other appropriate action the Commission may deem necessary.

OFFICE OF REGULATORY STAFF

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Columbia, South Carolina
December 8th, 2008

COMMISSION HEARING OFFICER DIRECTIVEADMINISTRATIVE
MATTERS☐DATE September 2, 2008MOTOR CARRIER
MATTERS☐DOCKET
NO. 2008-196-E

UTILITIES MATTERS

☒ORDER NO. N/A-**HEARING
OFFICER:****Jocelyn G. Boyd****DOCKET DESCRIPTION:**

Combined Application of South Carolina Electric and Gas Company for a Certificate of Environmental Compatibility and Public Convenience and Necessity and for a Base Load Review Order for the Construction and Operation of a Nuclear Facility in Jenkinsville, South Carolina

ADMINISTRATIVE MATTERS UNDER CONSIDERATION:

October 27, 2008, Hearing Date and Prefile Testimony Deadlines

HEARING OFFICER ACTION:

In August 2008, the South Carolina Energy Users Committee (SCEUC) and CMC Steel South Carolina (CMC Steel) requested that the October 27, 2008, hearing date be continued and that the prefiling deadlines be extended to permit the parties sufficient time to investigate and develop the record regarding South Carolina Electric and Gas Company's Combined Application. Both SCEUC and CMC Steel requested that the Commission continue the hearing until January 12, 2009. Further, CMC Steel and SCEUC requested that the prefiled testimony deadlines be set as follows:

Direct Testimony of Applicant – September 16, 2008
 Direct Testimony of All Other Parties – November 17, 2008
 Rebuttal Testimony – December 1, 2008
 Surrebuttal Testimony – December 15, 2008

Thereafter, the Public Service Commission received several requests to continue the

scheduled October 27, 2008, hearing date in the instant Docket and to extend the prefiled testimony deadlines. On August 27, 2008, a Prehearing Conference was held at the Commission, and several parties appeared and stated their positions regarding the scheduled hearing and prefiled testimony dates. The following parties were present for the Prehearing Conference: Belton T. Zeigler, Esq., K. Chad Burgess, Esq., and Mitchell Willoughby, Esq., all representing South Carolina Electric and Gas Company (SCE&G); Damon E. Xenopoulos, Esq. (via telephone) and Joey Floyd, Esq., both representing CMC Steel South Carolina; Joseph Wojcicki, representing himself; Maxine Warshauer, representing herself; Mildred A. McKinley, representing herself; Nanette S. Edwards, Esq., and Shannon Hudson, Esq., both representing the Office of Regulatory Staff; Pamela Greenlaw, representing herself; Robert Guild, Esq., representing Friends of the Earth; and Scott Elliott, Esq., representing the South Carolina Energy Users Committee. Some of the reasons articulated by some of the parties for extending the hearing date and prefiled testimony deadlines include allowing the parties sufficient time to review voluminous stacks of discovery; recognizing that the parties must make scheduling arrangements with SCE&G to review confidential documents; allowing the intervenors adequate time to review SCE&G's direct testimony and to conduct additional discovery, if necessary; and providing sufficient time for the parties to prepare for the hearing in this Docket.

SCE&G's Combined Application for a Certificate of Environmental Compatibility and Public Convenience and Necessity and for a Base Load Review Order is the first of its kind before the Commission. While I believe that the parties should not wait until the last minute to conduct discovery and to begin preparing for this case, I do believe that the

issues in the instant Docket are complex, novel, and that none of the parties present at the Prehearing Conference objected to some form of a continuance.

Therefore, the hearing in this Docket currently scheduled to begin on Monday, October 27, 2008, is rescheduled to begin on Monday, December 1, 2008, at 9:30 a.m. and to continue through Friday, December 5, 2008, if necessary. Additionally, the parties are to comply with the following prefiled testimony deadline schedule:

Applicant's Direct Testimony Due – September 16, 2008
All Other Parties' Direct Testimony Due – October 17, 2008
Applicant's Rebuttal Testimony Due – October 31, 2008
All Other Parties' Surrebuttal Testimony Due – November 14, 2008.

All testimony must be filed with the Commission and served on the parties via e-mail on or before the dates prescribed. If a party does not have an e-mail address, then such party must be served a copy of the testimony by First-Class U.S. Mail.

A couple of intervenors requested information regarding the publication of the Commission's regulations and statutes governing the Commission's jurisdiction. The Commission's regulations and Title 58 can be accessed on the Commission's website at www.psc.sc.gov by clicking on "Regulations, Laws, Policies, and Procedures" on the left-hand side of the Commission's webpage.

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2008-196-E

IN RE: Combined Application of South Carolina Electric
and Gas Company for a Certificate of)
Environmental Compatibility and Public) **CERTIFICATE OF**
Convenience and Necessity and for a Base Load) **SERVICE**
Review Order for the Construction and Operation)
of a Nuclear Facility in Jenkinsville, South)
Carolina)

This is to certify that I, Pamela J. McMullan, have this date served one (1) copy of the **MOTION TO QUASH** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

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Pamela J. McMullan

December 8, 2008
Columbia, South Carolina